

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ALBERT MEDINA,

Plaintiff,

vs.

CHERYL BURSON, et al.,

Defendants.

Case No. 2:09-CV-02121-KJD-(RJJ)

ORDER

Before the court is plaintiff's civil rights complaint pursuant to 42 U.S.C. § 1983. The court has reviewed it. The court will dismiss one count, and plaintiff will need to show cause why the remaining count, and the action, should not be dismissed as untimely.

When a "prisoner seeks redress from a governmental entity or officer or employee of a governmental entity," the court must "identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b). Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint for failure to state a claim upon which relief can be granted. Review under Rule 12(b)(6) is essentially a ruling on a question of law. North Star Intern. v. Arizona Corp. Comm'n, 720 F.2d 578, 580 (9th Cir. 1983). In considering whether the plaintiff has stated a claim upon which relief can be granted, all material allegations in the complaint are accepted as true and are to be construed in the light most favorable to the plaintiff. Russell v. Landrieu, 621 F.2d 1037,

1 1039 (9th Cir. 1980). Allegations of a pro se complainant are held to less stringent standards than
2 formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam).

3 Plaintiff is in the custody of the Nevada Department of Corrections. The events that
4 he alleges in his complaint occurred at the High Desert State Prison, the Northern Nevada
5 Correctional Center, and the Southern Desert Correctional Center. The court will address his counts
6 in chronological order instead of their numerical order.

7 In count 2, plaintiff alleges that before September 2002 he had suffered a crushing
8 injury to his left hand. That month, while imprisoned at the High Desert State Prison, he noticed
9 that green fluid was seeping between the sutures. Medical staff examined the hand and determined
10 that plaintiff needed emergency medical treatment. Plaintiff was transferred to the Northern Nevada
11 Correctional Center. There, doctors determined that the wound was gangrenous, and they initially
12 treated plaintiff with strong antibiotics. Plaintiff alleges that the doctors approved surgery for his
13 hand, but that the only treatment he received was a scraping of the bone to remove the infection.
14 Plaintiff alleges that if he had received the treatment originally authorized, his hand would still be
15 useful today.

16 There are a couple of problems with this count, but one that requires addressing
17 before all others is its apparent untimeliness. Because 42 U.S.C. § 1983 does not have its own
18 statute of limitations, a court uses the statute of limitations for personal injury actions of the State in
19 which it is located. Wilson v. Garcia, 471 U.S. 261 (1985). In Nevada, the applicable statute of
20 limitations is Nev. Rev. Stat. § 11.190(4)(e), which has a period of limitations of two (2) years.
21 Perez v. Seevers, 869 F.2d 425, 426 (9th Cir. 1989). “Federal law determines when a cause of
22 action accrues and the statute of limitations begins to run for a § 1983 claim. A federal claim
23 accrues when the plaintiff knows or has reason to know of the injury which is the basis of the
24 action.” Bagley v. CMC Real Estate Corp., 923 F.2d 758, 760 (9th Cir. 1991), cert. denied, 502
25 U.S. 1091 (1992) (citations and internal quotations omitted). Plaintiff alleges that he noticed the
26 medical problem in September 2002. Therefore, the period of limitations appears to have run out
27 not later than the end of September 2004. Plaintiff needs to show cause why the court should not
28 dismiss count 2 as untimely.

1 In count 1, plaintiff alleges that defendant Smith, the law library supervisor at the
2 Southern Desert Correctional Center, and defendant Neese, a correctional officer who worked in
3 that prison's mail room, impeded his right of access to the courts. Plaintiff has a right of effective
4 access to the courts. Lewis v. Casey, 518 U.S. 343, 346 (1996). Plaintiff must prove an actual
5 injury to that right, such as a missed filing deadline or the inability to present a claim. Id. at 348.

6 Plaintiff alleges that in June or July 2008 he mailed a box of documents relating to
7 his criminal case to the Rocky Mountain Innocence Center, but that organization did not receive the
8 box. Despite that loss, plaintiff was able to file a petition for a writ of habeas corpus pursuant to 28
9 U.S.C. § 2254 in this court, and counsel now represents plaintiff. See Medina v. Williams, Case
10 No. 2:09-CV-01331-GMN-(GWF). Plaintiff has not suffered an actual injury from the loss of that
11 box.

12 Plaintiff also alleges that on March 13, 2008, he sent a package of medical
13 documents to a person, who never received the package. The documents related to the injury to his
14 left hand and the treatment that he received, as described in count 2. Plaintiff cannot show that he
15 suffered an actual injury for one of two reasons. First, assuming that count 2 is untimely, the
16 medical documents were lost three and a half years after the period of limitations had already run
17 out. Even if plaintiff missed the filing deadline, the loss of the medical documents did not cause
18 plaintiff to miss that deadline. Second, assuming that count 2 is timely, plaintiff was able to raise in
19 count 2 a claim regarding the treatment that he received for the injury despite the loss of those
20 documents. If the action proceeds, then plaintiff will have other means for obtaining those
21 documents again.

22 Amendment of the complaint cannot cure these defects. The existence of this action
23 and of Medina v. Williams show that plaintiff has not suffered an actual injury to his right of access
24 to the courts.

25 Also in count 1, plaintiff alleges that defendant Burson, an associate warden at the
26 Southern Desert Correctional Center, did not give plaintiff the relief that he sought through the
27 prison's grievance procedure regarding the loss of his mail. Plaintiff does not have a federal
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1 constitutional right to an effective grievance procedure. Mann v. Adams, 855 F.2d 639, 640 (9th
2 Cir. 1988) (order). Amendment of the complaint cannot cure this defect.

3 IT IS THEREFORE ORDERED that count 1 of the complaint is **DISMISSED** for
4 failure to state a claim upon which relief can be granted.

5 IT IS FURTHER ORDERED that plaintiff shall have thirty (30) days from the date
6 of entry of this order to show cause why the court should not dismiss this action as untimely.
7 Failure to comply with this order will result in the dismissal of this action.

8 DATED: August 4, 2010

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11 KENT J. DAWSON
12 United States District Judge
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